

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN KELSEY,

Defendant.

)  
) Case No. 3:21-cr-00264-1  
)  
) WAVERLY D. CRENSHAW, JR.  
) CHIEF DISTRICT JUDGE  
)  
)

BEFORE THE HONORABLE

WAVERLY D. CRENSHAW, JR., CHIEF DISTRICT JUDGE

September 21, 2023

APPEARANCES:

FOR THE Plaintiff:

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1           The above-styled cause came on to be heard on  
2     September 21, 2023, before the Honorable Waverly D.  
3     Crenshaw, Jr., Chief District Judge, when the following  
4     proceedings were had, to-wit:

5           THE COURT: All right. Be seated.

6           All right. We're here on Case 21-264, *United*  
7     *States of America versus Brian Kelsey*. And Mr. Kelsey is  
8     here.

9           If counsel want to make your appearance on the  
10    record.

11          MS. KLOPF: Good afternoon, Your Honor. Amanda  
12    Klopf on behalf of the United States for the Middle District  
13    of Tennessee. I'm here with my colleague John Taddei from  
14    the Public Integrity Section.

15          MR. TADDEI: Good afternoon, Your Honor.

16          MR. LITTLE: Good afternoon, Your Honor. Alex  
17    Little and Zachary Lawson on behalf of Mr. Kelsey.

18          THE COURT: All right. So I've read the motion  
19    and all the supporting briefs.

20          And I guess, Mr. Little, I'll start with you. You  
21    contend there's a substantial question of law and fact.  
22    Correct?

23          MR. LITTLE: Yes.

24          THE COURT: Do we need an evidentiary hearing?

25          MR. LITTLE: No, Your Honor. I don't believe so.

1           THE COURT: All right. Let's -- that's what I  
2 want to discuss.

3           MR. LITTLE: Do you want me to approach?

4           THE COURT: Sure.

5           MR. LITTLE: Your Honor, I've had the opportunity  
6 to litigate an issue like this in a number of courtrooms.

7           The question is generally not a factual question  
8 as to whether there's a substantial question. A substantial  
9 question --

10          THE COURT: Oh, I'm sorry. I misstated then. I'm  
11 not -- I'm saying assuming there is a substantial question --

12          MR. LITTLE: Oh, yes.

13          THE COURT: -- the determination of that needs to  
14 be based on --

15          MR. LITTLE: The record.

16          THE COURT: Exactly.

17          MR. LITTLE: Yeah.

18          THE COURT: And you contend that there was a plea  
19 agreement and the government breached it?

20          MR. LITTLE: That's correct. All a part of the  
21 record the Sixth Circuit will be able to look at.

22          THE COURT: And the government says maybe.

23          MR. LITTLE: It's unclear --

24          THE COURT: So that's -- that's the -- that's the  
25 factual inconsistency here that led me to believe --

1 MR. LITTLE: Maybe on which part?

2 THE COURT: You say yes and they say maybe.

3 MR. LITTLE: Oh, as to the breach?

4 THE COURT: Yeah.

5 MR. LITTLE: Oh, sure. But it's a de novo  
6 question of law, Your Honor. There's not --

7 THE COURT: Well -- but it's -- okay. I'll let  
8 you finish.

9 MR. LITTLE: Yeah, it's a de novo question of law.  
10 The Sixth Circuit will be able to look at the plea  
11 agreement -- we have --

12 THE COURT: Based on what facts?

13 MR. LITTLE: Based on what occurred on the docket.

14 THE COURT: Okay. That's what I guess I wanted to  
15 get clarity. So you think the record's sufficient.

16 MR. LITTLE: Oh, yes.

17 THE COURT: And you do not want, and do not  
18 request, an evidentiary hearing?

19 MR. LITTLE: No. The breach occurred on the  
20 Court's docket in the transcript through its behavior. It  
21 didn't happen outside of the court. So if it happened  
22 outside of the court, if they filed a case somewhere else or  
23 done something else, we would have had to put that on the  
24 record. We haven't had to do any of that.

25 THE COURT: I'm with you. But I've not made a

1 finding there was a breach.

2 MR. LITTLE: No. That's why we're appealing,  
3 because you did not find --

4 THE COURT: So you want the Sixth Circuit -- well,  
5 you didn't ask me to either. But you want the Sixth Circuit  
6 to make that determination in the first instance?

7 MR. LITTLE: That's correct.

8 THE COURT: Okay.

9 MR. LITTLE: And so I think --

10 THE COURT: That's something they typically don't  
11 do.

12 MR. LITTLE: Well, Your Honor, I think on this  
13 record they can.

14 THE COURT: Okay.

15 MR. LITTLE: With respect to --

16 THE COURT: And they may. Or they may not.

17 MR. LITTLE: Right.

18 THE COURT: Okay.

19 MR. LITTLE: And with the other pieces of this,  
20 under the standard he has to be, you know, not a risk of  
21 flight.

22 THE COURT: Right.

23 MR. LITTLE: And not a danger to the community.

24 We would say those decisions have already been  
25 made by the Court releasing him to serve his -- his -- you

1 know, release -- self-surrender, essentially. It's the same  
2 statute, the same determination. No change of facts.

3 THE COURT: Okay. Let's hear from the government.

4 MS. KLOPF: Your Honor, in terms of evidentiary  
5 hearing, it's -- I actually believe it would be inappropriate  
6 to do one, because the record is what it is. And it -- the  
7 appropriate time for Mr. Little to have said that the -- that  
8 he believed the United States was breaching would have been  
9 in the sentencing hearing. *Puckett* lays out very clearly  
10 what the defendant would have had to do in order to allege  
11 the United States -- it has breached the plea agreement. And  
12 given that that did not occur, as we briefed in great detail,  
13 that's why we believe that plain error would apply on review.  
14 But at this point in the proceedings, further -- further  
15 evidentiary hearing, it -- is not necessary or appropriate.

16 THE COURT: So let me rephrase it again. And  
17 that's why I really brought us together.

18 It sounds like, and the government is of the  
19 position, no evidentiary hearing is needed or appropriate.

20 MS. KLOPF: Yes, Your Honor. I think --

21 THE COURT: So on that much you and Mr. Kelsey  
22 agree?

23 MS. KLOPF: I believe so. Yes.

24 THE COURT: Okay. Go ahead. I cut you off.

25 MS. KLOPF: Oh, no. I didn't have anything

1 further.

2 THE COURT: No. I guess what -- we now have that  
3 on the record. So --

4 Well, let me ask you the same question I asked  
5 Mr. Little.

6 You agree there's been no finding by this Court  
7 that the plea agreement has been breached or not breached?  
8 I've not addressed that.

9 MS. KLOPF: Exactly, Your Honor. Because it  
10 wasn't put before Your Honor at the sentencing hearing.

11 THE COURT: Okay.

12 MS. KLOPF: Because, you know, the appropriate  
13 objection was not made, the Court couldn't make a further  
14 inquiry, and specifically, I think, and importantly, remedy,  
15 if there was an issue, remedied it in realtime. And that's  
16 why the Sixth Circuit does put that onerous on the defendant  
17 to make those objections in realtime, so that if it's  
18 possible for it to be remedied in that moment, it can be.  
19 But in this particular instance it was not.

20 THE COURT: All right. Okay.

21 Well, Mr. Little, you can certainly respond.

22 MR. LITTLE: May I respond to that, Your Honor?

23 THE COURT: Sure.

24 MR. LITTLE: We did raise the objection.

25 THE COURT: Well, I think we can agree the record

1 speaks for itself.

2 MR. LITTLE: It does.

3 THE COURT: Okay.

4 MR. LITTLE: And I think that there's a dispute  
5 here. They think somehow that that's not sufficient. I  
6 don't think they can point to a single case where there's  
7 been a colloquy about an issue where the Court has given the  
8 same exact answer that they subsequently gave in their  
9 brief --

10 THE COURT: Well, and maybe not. But that's,  
11 again, why I said do we need to have an evidentiary hearing.  
12 There again, you're saying now the record says X, they say it  
13 says Y.

14 MR. LITTLE: Well, I think we're interpreting the  
15 same record. We both agree that the document that I filed  
16 that is the transcript is the transcript.

17 THE COURT: Is the transcript. It speaks for  
18 itself.

19 MR. LITTLE: It does.

20 And it's our position that in that transcript we  
21 sufficiently raised it and it was denied. I agree that you  
22 did not ever determine that there was a breach. That is the  
23 error that we are raising with the Sixth Circuit. That there  
24 should have been a determination that there was a breach.

25 THE COURT: Well, I guess that goes back -- I've



1 never been asked to make -- there's never been a motion  
2 before me or bring that issue to me to make that  
3 determination.

4 MR. LITTLE: Your Honor, and I think our position  
5 on appeal will be that that objection -- the objection that  
6 we made in the moment contemporaneous was sufficient to raise  
7 that issue.

8 THE COURT: Okay.

9 MR. LITTLE: And I think the question -- you know,  
10 to delineate that a little bit is, we raised the objection;  
11 the Court answered that objection in a manner which suggested  
12 that it was not finding the objection basically valid or  
13 sustained. And at that point there's no reason to move on to  
14 the remedy, because the objection has been done. I can  
15 imagine, if I object to hearsay --

16 THE COURT: Well, now again -- go ahead.

17 MR. LITTLE: Yeah, if I object to a hearsay  
18 objection, Your Honor, and the Court says it's not hearsay,  
19 there's no point for me to then ask I think it should be  
20 stricken from the record. The Court has just ruled and said  
21 it's not hearsay. So I agree the record speaks for itself.  
22 And our interpretation on appeal is that there's no need to  
23 make an additional inquiry once the Court has ruled.

24 THE COURT: Well, I'll put on the record, still, I  
25 did not interpret your objection as a request that I make a

1 finding about whether or not the plea agreement had been  
2 breached or --

3 MR. LITTLE: And, Your Honor, I think for purposes  
4 of this record, that finding probably isn't part of the  
5 record on appeal, which closed at the time the sentence came  
6 up. These are now post appeal proceedings. And I think it's  
7 our position that the Court will have the record that it has.

8 THE COURT: And I guess both sides can decide what  
9 is and what's not in the record.

10 MR. LITTLE: Sure.

11 THE COURT: Okay. Anything else from the  
12 government?

13 MS. KLOPF: Your Honor, more broadly. I -- I just  
14 think this goes to our bigger argument -- which I will not  
15 belabor because we have briefed it significantly -- but this  
16 does not raise the substantial question of law or fact that  
17 is required under the Sixth Circuit precedent for a bail  
18 pending appeal.

19 THE COURT: And what do you define "this" to be?

20 MS. KLOPF: The argument that -- I mean, as we  
21 argued quite a bit in our papers -- but we believe plain  
22 error will apply because --

23 THE COURT: Go ahead. But I mean you all are  
24 talking about the scope of review on appeal. That's not  
25 helpful to the Court. What's helpful to the Court is for us

1 to focus on what is the substantial question of law and fact.  
2 And I hear Mr. -- I hear Mr. Little saying the substantial  
3 question of law and fact is the government breached the plea  
4 agreement.

5 MS. KLOPF: And, Your Honor, under either --

6 THE COURT: Is that the same issue you all see?

7 MS. KLOPF: We understand that what they are  
8 raising is whether or not the United States breached the plea  
9 agreement.

10 THE COURT: And is that not -- do you -- and if  
11 that's the substantial issue of fact -- law or fact that  
12 the -- that the defense is raising upon, does the government  
13 see a different issue?

14 MS. KLOPF: No, Your Honor. That -- that is the  
15 issue.

16 THE COURT: And your position is maybe it was  
17 breached, maybe it wasn't.

18 MS. KLOPF: We believe it was not breached. But I  
19 did --

20 THE COURT: And therefore it's still in effect  
21 going up on appeal?

22 MS. KLOPF: Yes, Your Honor. And again, you know,  
23 this Court doesn't have to pre-judge the issue or determine  
24 whether or not it could be plain error or anything like that.

25 THE COURT: Exactly.

1 MS. KLOPF: But for purposes of these motions, all  
2 the Court has to decide is whether or not there's a  
3 substantial question of law or fact --

4 THE COURT: On whether or not the government  
5 breached the plea agreement during the sentencing?

6 MS. KLOPF: Exactly. And whether or not -- the  
7 next question is that would result in a reversal, an order  
8 for a new trial, or a sentence that doesn't include a term of  
9 imprisonment. Which presented here, it does not. It's not  
10 satisfied.

11 Even if the Sixth Circuit rejected every single  
12 one of the United States' argument that we've kind of touched  
13 on in our papers, the likely result would be that he would be  
14 headed to resentencing before a different judge, where the  
15 defendant would be facing the exact same guidelines range,  
16 which were 37 to 41 months. This defendant received a  
17 significant downward departure to a sentence of 21 months --  
18 I'm sorry -- variance -- thank you -- but it was below  
19 guidelines.

20 So a new judge -- if that's what we ended up  
21 having happen -- would have to vary downward so far for the  
22 defendant to not have a custodial sentence that it's hard to  
23 actually imagine -- particularly in light of the defendant's  
24 behavior in this particular case. And it's certainly not an  
25 issue that could go either way.

1           So unless the Court has any other questions about  
2 our papers, I'll rest on that.

3           THE COURT: All right. Mr. Little.

4           MR. LITTLE: I think my concern -- and the  
5 government keeps doing it. Is they want to make this a  
6 little messier. They don't want to actually be specific.

7           So the provision that was just responded to by  
8 Ms. Klopff, it's not a question of whether there's no  
9 potential jail sentence upon resentencing. The actual  
10 standard is whether the sentence would be less than the time  
11 it would take to adjudicate the appeal.

12           There is a case that we cited in our reply  
13 where -- you know, this is a case where he got 21 months. If  
14 he got, for example, ten months on resentencing, that likely  
15 would be less time than it would take the Sixth Circuit to  
16 adjudicate an appeal, which is generally over 12 months. And  
17 so the standard is not what Ms. Klopff said. It is not that  
18 he's likely to get no jail time. It's the question of his  
19 sentence in relation to the potential other options on  
20 appeal. So that's one thing I wanted to raise just at that  
21 issue.

22           The second part is, this is a case where we argued  
23 very strenuously for probation. The Court obviously did not  
24 do that. But we had I think a strong argument for why  
25 probation was appropriate in light of other circumstances. I

1 don't think there's -- the Court certainly cannot say it's  
2 not a question that the defendant might get probation in that  
3 circumstance to such degree as to rely on the government's  
4 arguments here. But taking all of that -- basically saying  
5 if the government says, well, he might get resentenced, but  
6 it will be more than, you know, a year, there's just no firm  
7 basis to believe that, not knowing what a different judge  
8 would do on the same set of facts.

9           But I think more importantly is their presumption  
10 that he would get resentencing is completely devoid of  
11 authority. They have not showed you a single case -- and as  
12 you can probably tell from our briefs, we have researched  
13 this question thoroughly across the circuits. We cannot find  
14 a single case where a defendant who has been the subject of a  
15 government breach has ever been forced to a remedy of  
16 specific performance. This is a contract situation. The  
17 government breaches the contract. And the defendant is the  
18 party who is harmed. The general concept is that he gets an  
19 opportunity to elect and express the election of remedies.

20           I totally concede this is an unusual circumstance  
21 in which a defendant who has pled guilty would want to undo  
22 that plea. Nine times out of ten, if not 99 out of 100, when  
23 you get the situation the government breaches, the defendant  
24 wants specific performance. They want to go back. They want  
25 to be resentenced with the correct recommendations.

1           And so the government just presuming and telling  
2 you, again, without any factual or legal basis that this is  
3 what's going to happen, we've provided you both in the  
4 original motion and our reply strong legal arguments that he  
5 would get to completely undo his plea.

6           THE COURT: Right. So what is the issue  
7 Mr. Kelsey is appealing?

8           MR. LITTLE: He's appealing the breach of the plea  
9 agreement and that as a result of that --

10          THE COURT: During the sentencing hearing?

11          MR. LITTLE: Yes.

12          THE COURT: Anything else?

13          MR. LITTLE: At this point that is all we're  
14 raising here. We haven't filed our brief yet.

15          THE COURT: Okay.

16          MR. LITTLE: One of the things that we raised --

17          THE COURT: Well, you said at this point.

18          MR. LITTLE: Well, so -- if you recall, we pointed  
19 out the government won't tell us whether or not the plea  
20 agreement is in effect.

21          THE COURT: I think she just did.

22          MR. LITTLE: But I want to confirm that's the  
23 case. They --

24          THE COURT: Well, the record -- no, we don't --  
25 you know, you address yourself to me.

1 MR. LITTLE: Well, so -- yeah, but I want --

2 THE COURT: The record speaks for itself.

3 MR. LITTLE: Well, Your Honor -- I think,  
4 respectively, we have -- I'll ask this as relief. We would  
5 ask the Court to inquire based on the government's behavior  
6 whether or not the plea agreement remains in effect.

7 THE COURT: And I just -- I think the record  
8 already addresses that from what she's already said.

9 MR. LITTLE: Well, the reason I think that's not  
10 true, Your Honor, is because the argument they made to this  
11 Court was that somehow my client's alleged prior breach  
12 excused their breach.

13 THE COURT: Well, I'm going to let you get the  
14 transcript. But I just posed those questions. She answered  
15 it. And I actually looked to you because I thought, well,  
16 now you've got your answer.

17 MR. LITTLE: Okay. And I appreciate that. So if  
18 that's there, then that would tell me that we don't have an  
19 argument that -- if there was no plea agreement currently,  
20 that would potentially change what our appeal might be. So  
21 to answer your question, I can't give you that answer yet,  
22 but, yes, the bulk of our appeal is --

23 THE COURT: To answer my question, you cannot  
24 answer my question.

25 MR. LITTLE: I can't tell you for sure --



1 THE COURT: What issues --

2 MR. LITTLE: -- until we file the brief if there's  
3 going to be any other issues.

4 THE COURT: Okay.

5 (Coughing interruption.)

6 MR. LITTLE: -- the heart of the appeal is the  
7 breach of the plea agreement.

8 We believe it is the breach of the plea agreement  
9 that will allow Mr. Kelsey on remand to get recision for the  
10 plea agreement and not -- and have his plea -- have his plea  
11 withdrawn. So that's what we believe the result of the error  
12 will be.

13 And so here, just going back to the substantial  
14 question, it is, is it -- is it a closed question or a  
15 question whether the government breached.

16 I think given the arguments you've seen there are  
17 very strong arguments on the defendant's side that certainly  
18 cannot be discounted that the government has breached. I'm  
19 happy to address any of those if you wish to speak to them.  
20 I certainly don't think our arguments are foreclosed.

21 In that scenario, that he is likely, based on the  
22 case law we presented you, to be able to withdraw his plea,  
23 which would obviously result in no jail time whatsoever.  
24 Even if the government were correct and somehow on remand  
25 this Court, or whatever court, were to be the first to ever

1 require a defendant to get specific performance and -- and  
2 basically stick with the plea he doesn't want, even though  
3 the government breached, there still is no assurance that he  
4 would get less jail time than the time he would be doing in  
5 jail while the appeal proceeds.

6 THE COURT: But all that is speculation. You  
7 first need to succeed in the Sixth Circuit.

8 MR. LITTLE: Yes. I mean --

9 THE COURT: And for purposes of this issue; that  
10 is, whether or not the government breached the plea  
11 agreement, Mr. Kelsey says no evidentiary hearing is  
12 necessary whatsoever.

13 MR. LITTLE: That's right. We believe --

14 THE COURT: And to the extent I'm offering one, he  
15 waives it?

16 MR. LITTLE: Well -- that's right.

17 THE COURT: All right.

18 MR. LITTLE: The statement that was made that --  
19 Mr. Taddei made at the sentencing hearing advocating for  
20 those two points was the breach of the plea.

21 THE COURT: And the government agrees, to the  
22 extent that that's the issue that Mr. Kelsey wants to raise,  
23 and that is whether or not the government breached the plea  
24 agreement at the sentencing hearing, the government's  
25 position is in lockstep with Mr. Little; that is, no

1 evidentiary hearing is needed, and to the extent this Court  
2 wants to offer you one, the government waives it?

3 MS. KLOPF: Yes, Your Honor. I interpret  
4 Mr. Little's argument to be what you just articulated, and  
5 that we do not think that an evidentiary hearing on that  
6 issue is necessary.

7 THE COURT: So the answer to my question is yes?

8 MS. KLOPF: Yes.

9 THE COURT: Okay.

10 MR. LITTLE: And I will defer, unless you have  
11 questions about any of those --

12 THE COURT: I do not. But this has been helpful.  
13 And I'm sensitive to Mr. Kelsey's report date, and I'll get  
14 you an order in timely fashion.

15 MR. LITTLE: Thank you, Your Honor.

16 THE COURT: Thanks.

17 (Court adjourned.)  
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1 REPORTER'S CERTIFICATE

2  
3 I, Lise S. Matthews, Official Court Reporter for  
4 the United States District Court for the Middle District of  
5 Tennessee, with offices at Nashville, do hereby certify:

6 That I reported on the Stenograph machine the  
7 proceedings held in open court on September 21, 2023, in the  
8 matter of UNITED STATES OF AMERICA v. BRIAN KELSEY, Case No.  
9 3:21-cr-00264-1; that said proceedings in connection with the  
10 hearing were reduced to typewritten form by me; and that the  
11 foregoing transcript (pages 1 through 19) is a true and  
12 accurate record of said proceedings.

13 This the 22nd day of September, 2023.

14  
15 /s/ Lise S. Matthews  
16 LISE S. MATTHEWS, RMR, CRR, CRC  
17 Official Court Reporter  
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